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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LESLIE GRISHAM,
Plaintiff,

v.

PHILIP MORRIS USA INC., et al.
Defendants.

Case No. 02-7930 SVW (Rcx)

Judge: Hon. Stephen V. Wilson

**PLAINTIFF'S REPLY TO
DEFENDANTS'
SUPPLEMENTAL
OPPOSITION TO MOTION TO
STAY**

Date: July 6, 2009
Time: 1:30 p.m.
Courtroom: 6

PLAINTIFF'S REPLY TO DEFENDANTS'
SUPPLEMENTAL OPPOSITION TO MOTION TO STAY

Introduction

Fraud by any other name is still fraud. The DOJ case is about how these defendants fraudulently concealed the health dangers of smoking cigarettes for decades. Leslie Grisham's case is about how the very same defendants fraudulently concealed periodontal disease as a health danger of smoking. In the DOJ case, Judge Kessler enjoined these defendants from committing more fraud. Yet by continuing to assert that Grisham should have discovered that her periodontal disease was caused by cigarettes in the 1980s — at a time when

defendants were misleading the public by hiding or denying or creating controversy over the dangers of cigarettes — defendants are once again committing fraud. But this time their fraud is in direct violation of a federal court judge’s bar order and the appellate court’s approval of that order. Until the DOJ ruling is finalized by the United States Supreme Court, the Grisham case, where the issue of fraud is front and center for deciding the summary judgment motion on statute of limitations, should be stayed.

Explanation of California’s delayed discovery rule

Under California’s “delayed discovery” rule, when a plaintiff does not discover the defendant’s wrongdoing at the time of the injury, the limitations period does not start until the cause of action *accrues*. A cause of action accrues when the elements of injury, wrongdoing, and resultant damages are completed. *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397. A defendant’s fraud in concealing a cause of action against him will toll the limitations period, and that tolling will last as long as a plaintiff’s reliance on the misrepresentations is reasonable. *Grisham v. Philip Morris U.S.A., Inc., et al.*, 40 Cal.4th 623, 637 (2007). Here, defendants’ fraud and fraudulent concealment of their wrongdoing tolled the statute of limitations on Grisham’s periodontal claim until she learned that her injuries were smoking related in April of 2001.

Delayed discovery allegations of Grisham’s complaint

Grisham has properly invoked sufficient information for the Court to determine that the discovery rule has been pled in her Third C/A for false representation, FAC ¶¶ 60-65; Fourth C/A for fraudulent concealment, FAC ¶¶ 66 - 78; and Sec. IV: Allegations and Facts Re: Delayed Discovery of Addiction-Related Injuries . . . , FAC ¶¶ 169 - 189. She has pled that she did not learn until April of 2001 that smoking caused periodontal disease. “[A]

1 plaintiff's ignorance of wrongdoing involving a product's defect will usually
 2 delay accrual [of the cause of action] because *such wrongdoing is essential to*
 3 *that cause of action.*" *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797,
 4 813; *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal. App. 4th 1048).

5 **Reasons to apply the DOJ case and stay the proceedings**

6 Because the DOJ decision on defendants' fraud and fraudulent conduct is
 7 so broad reaching, it affects every one of Grisham's remaining claims.

8 Collateral estoppel or issue preclusion is appropriate for the court to consider
 9 due to the numerous claims of fraud Grisham has made which are identical to
 10 the claims of fraud made in the DOJ case

11 Moreover, defendants' summary judgment motion argues affirmative
 12 defenses directly related to whether or not their conduct has been fraudulent.
 13 They argue that Grisham has no evidence to prove the reasonableness of her
 14 lack of discovery of the cause of her periodontal disease and a heightened duty
 15 to inquire as to its cause. But where a defendant has been found to have
 16 committed fraud [DOJ case], a plaintiff has no inquiry duty unless and until she
 17 receives "actual notice" of the cause of her injuries. *See, Garamendi v. SDI*
 18 *Vendome S.A.*, 276 F.Supp.2d 1030, 1042 (C.D.Cal.2003) [When intentional
 19 concealment tolls the statute of limitations, pursuant to "fraudulent concealment
 20 doctrine," something closer to actual notice than mere inquiry notice is required
 21 to end the tolling period, under California law.]).

22 **Reasons to apply the Pooshs case and stay the proceedings**

23 Because defendants' summary-judgment motion alleges as an affirmative
 24 defense to Grisham's COPD claims a single-injury rule, citing the Nikki Pooshs
 25 case, Grisham's motion to stay notified this court that the Pooshs case is now
 26 before the California Supreme Court on a certified question. *Nikki Pooshs v.*
 27 *Philip Morris, USA, Inc., et al*, No. S172023, 9th Circuit Case No. 04-16338.
 28

1 The question is whether a single-injury or a two-injury rule should be applied in
2 situations where a plaintiff has suffered two injuries at different times from the
3 same wrongdoing.

4 The defendants cited *Poosh*s in support of their theory that Grisham's
5 COPD claim is time-barred under California's single-injury rule. Because
6 Grisham learned that she had smoking induced periodontal disease in April of
7 2001 and COPD in July of 2001 and filed suit on March 15, 2002, she contends
8 that the court does not need wait to find out whether the California Supreme
9 Court will find that a two-injury rule applies to claims like her two claims.

10 However, the defendants have urged the application of a single-injury rule
11 as an affirmative defense to Grisham's COPD claim. While they have made
12 contradictory assertions that (1) Grisham knew she had COPD on February 27,
13 2001 (which she did not know), (2) Grisham does not have COPD (per their
14 expert witness reports), the court would need to know the answer to the certified
15 question before it could consider this defense.

16 **Conclusion**

17 The defendants' reasons for not staying this case are invalid. Their
18 summary judgment motion assume that this court will believe them when they
19 say they have not been misleading the public, including Leslie Grisham, for the
20 last 50 years. Judge Kessler found otherwise, and her decision enjoins them
21 from committing more fraud. Her findings of fraud should be applied to estop
22 the defendants from endlessly denying their fraudulent conduct and
23 misrepresentation of facts about cigarettes, smoking, health risks, nicotine
24 manipulation, the safety of light cigarettes, addiction and targeting of youth.
25 Alternatively, Grisham requests an opportunity to file a motion to assert
26 collateral estoppel and issue preclusion as related to the claims in her case.

27 ///

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1 Dated: June 25, 2009

Respectfully Submitted,

2 BAUM, HEDLUND, ARISTEI & GOLDMAN, P.C.

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